Manufactured Housing Association for Regulatory Reform

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October 21, 2019

VIA ELECTRONIC SUBMISSION

Manufactured Housing Consensus Committee
C/O Home Innovation Research Labs
Administering Organization
400 Prince Georges Boulevard
Upper Marlboro, Maryland 20774

Re: MHARR Regulatory Reform Comments

Dear MHCC Members:

The Manufactured Housing Consensus Committee (MHCC) has reached a crucial stage in its consideration of regulatory reform proposals submitted by the Manufactured Housing Association for Regulatory Reform (MHARR) and other parties in response to the "top-to-bottom" review of federal manufactured housing program regulations initiated by HUD Secretary Ben Carson pursuant to Trump Administration Executive Orders (EOs) 13771 and 13777.

The Manufactured Housing Improvement Act of 2000 requires that all substantive changes to the Federal Manufactured Housing Construction and Safety Standards (24 C.F.R. 3280) and the Manufactured Housing Procedural and Enforcement Regulations (24 C.F.R. 3282), as well as new or amended "interpretations" of those standards and regulations, be considered by the MHCC and recommended by the MHCC to the Secretary of HUD. Therefore, insofar as various regulatory reform proposals submitted by MHARR and others pursuant to EOs 13771 and 13777 entail specific proposed modifications to (or deletions of) certain aspects of those standards and regulations, MHARR has maintained that all such proposed modifications or deletions require submission to and consideration by the MHCC. Consistent with this position, HUD has undertaken a process for MHCC review and analysis of such proposals, as well as MHCC recommendations for final action by HUD.

Pursuant to this process, MHCC subcommittees have reviewed multiple regulatory reform proposals advanced by MHARR. Certain of those proposals address unique issues that have been raised only by MHARR, while others address matters that are the subject of similar proposals, submitted by one or more other parties. In each instance, though, the regulatory reform proposals submitted by MHARR pursuant to EOs 13771 and 13777 address vital concerns of its members both individually and collectively, and are designed to eliminate either unnecessary or unproven

regulatory burdens and related paperwork, in order to maintain and preserve the fundamental affordability of manufactured housing in a manner that is fully consistent with consumer protection and safety. Finally, and as is explained in greater detail below, two new regulatory Executive Orders issued by President Trump on October 9, 2019, fully support and indeed, require, the withdrawal of so-called HUD "guidance" documents and other sub-regulatory dictates that have not been subjected to either prior MHCC review or notice and comment rulemaking – as well as HUD's so-called "Interpretive Rule," seeking to read section 604(b)(6) out of the 2000 reform law – as sought by MHARR in various proposals detailed below. Those EOs, in particular, vindicate and completely support MHARR's longstanding position that such "guidance" documents and related unpublished sub-regulatory impositions are invalid and unlawful, and must be withdrawn.

MHARR, accordingly, urges the full MHCC to consider – and accept for recommendation to HUD – each of its regulatory reform proposals, including those specifically addressed herein, for the reasons stated below and as is more fully explained in its written comments to HUD dated June 7, 2017, February 20, 2018 and April 25, 2018.

I. SUMMARY

MHARR's regulatory reform proposals, as set forth and explained below, are designed to remedy specific regulatory abuses and overreaches by HUD that either violate the 2000 reform law or fundamentally misconstrue or misapply its terms. In particular, MHARR's proposals seek to eliminate an entire illegitimate layer of baseless pseudo-regulation that rests on a collection of unpublished "Field Guidance" memoranda, "Standard Operating Procedures," and other similar documents imposed without either MHCC consideration or notice and comment rulemaking which, according to newly-issued Executive Orders and earlier Justice Department policy statements, may not be used to impose binding new (or modified) regulatory mandates on any member of the public. Accordingly, MHARR asks that the MHCC vote to refer each of the following MHARR proposals for adoption and implementation by HUD:

- **DRC-2/DRC-281** (withdrawal of HUD's 2010 "Interpretive Rule" on section 604(b)(6));
- **DRC-219/DRC-77** (withdrawal of unpublished "Field Guidance" and procedures);
- **DRC-138** (withdrawal of pre-2000 reform law preemption "guidance");
- **DRC-26/DRC-139** (Subpart I reform to comply with 2000 reform law);
- **DRC-17/DRC-89** (revisions to on-site completion rule); and
- **DRC-57** (withdrawal of pending "voluntary" fire sprinkler rule).

II. SPECIFIC COMMENTS

DRC-2; DRC-281: DRC 2 and 281 both call for the repeal of a February 5, 2010 "Interpretive Rule" issued by HUD without opportunity for public comment, which effectively negates and reads out of the law, section 604(b)(6) of the Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5403(b)(6)). The Regulatory Enforcement Subcommittee voted unanimously to refer DRC-2 to HUD.[1] The General Subcommittee voted to develop and consider regulatory language

[1] See, Regulatory Enforcement Subcommittee Draft Minutes (August 6, 2019/August 14, 2019) at p. B-1.

protection and reform for both regulated parties and consumers. By its express terms, it requires any change to the substance or interpretation of a HUD manufactured housing standard, enforcement regulation, procedure, policy, or practice – including "monitoring" function practices -- be brought to the MHCC for prior review, consideration and recommendations, followed by notice and comment rulemaking. Any change adopted by HUD without such prior MHCC review and rulemaking is deemed preemptively "void."[3]

This reform was designed to require that any and all changes to HUD standards, enforcement practices, and "monitoring" activities, in particular, be considered through the MHCC consensus process and subjected to full notice and comment rulemaking prior to adoption and implementation by HUD. In part, this mandate was adopted by Congress: (1) to halt and remedy HUD's abuse of sub-regulatory "guidance" letters, memoranda and other similar unilateral devices prior to adoption of the 2000 reform law to either add new de facto regulatory mandates to the federal manufactured housing standards and Procedural and Enforcement Regulations – or "interpret" those standards and regulations in such a manner as to add new de facto regulatory mandates – without prior notice and comment in accordance with both the APA and federal manufactured housing law; and (2) to prevent the adoption of substantive or procedural changes without consensus support from program stakeholders.

Through its February 5, 2010 Interpretive Rule (copy attached), HUD interpreted the MHCC review and rulemaking mandate of section 604(b)(6) to apply only to actions that "meet the definition of a 'rule' under the [federal Administrative Procedure Act]"….[4] Actions that "meet the definition of a 'rule'" under the Administrative Procedure Act (APA) however, are already required by section 553 of the APA to be adopted via prior notice and comment rulemaking. Moreover, section 604(a)(4)(A) of the 2000 reform law already requires proposed manufactured housing standards be considered by the MHCC and published for notice and comment, while section 604(b)(4)(A) requires that all proposed enforcement regulations and "Interpretive Bulletins" be considered by the MHCC and published for notice and comment.

Consequently, as interpreted by the February 5, 2010, HUD "Interpretive Rule," section 604(b)(6) adds nothing to the law that is not already included in either the APA or other sections of the 2000 reform law. The Interpretive Rule, accordingly, would render section 604(b)(6) meaningless and of no effect. This construction, however, violates the most fundamental rules of statutory construction as established by the courts, which require that every part of a statute be given full and complete effect if possible.

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[3] Section 604(b)(6) states: "Any statement of policies, practices, or procedures relating to construction and safety standards, regulations, inspections, monitoring, or other enforcement activities that constitutes a statement of general or particular applicability to implement, interpret, or prescribe law or policy by the Secretary is subject to subsection (a) or this subsection. Any change adopted in violation of subsection (a) or this subsection is void." (Emphasis added). "Subsection (a)" as referred to in subsection 604(b)(6), is a reference to the MHCC review required for new or modified Manufactured Housing Construction and Safety Standards pursuant to section 604(a) of the 2000 reform law. Similarly, the term "or this subsection" refers to the MHCC procedures required for the adoption of "other orders" (i.e., Procedural and Enforcement Regulations or interpretations) pursuant to section 604(b) of the 2000 reform law.

[4] See, Attachment 1, hereto, 75 Federal Register No. 24 (February 5, 2010), p. 5888, et seq. "Federal Manufactured Home Construction and Safety Standards and other Orders: HUD Statements that are Subject to Consensus Committee Processes," at p. 5889, col. 3.

Moreover, the lack of any valid legal basis for the 2010 Interpretative Rule is confirmed by opinions issued by the U.S. Department of Justice on November 16, 2017[5] and January 25, 2018,[6] and by two new Executive Orders issued by President Trump on October 9, 2019.[7] In relevant part, the November 16, 2017 memorandum from the Attorney General states: "[G]uidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch." (Emphasis added). This is entirely consistent with the original intent, purpose and language of section 604(b)(6) as enacted by Congress. Similarly, the January 25, 2018 Justice Department memorandum states, in relevant part: "Guidance documents cannot create binding requirements that do not already exist by statute or regulation. Accordingly, effective immediately for ACE cases,[8] the [Justice] Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules."

These same principles, in turn, are incorporated and expanded in the Executive Orders issued by the President on October 9, 2019. Accordingly, the EO on "Promoting the Rule of Law Through Improved Agency Guidance Documents" specifically states that "agencies may impose legally binding requirements on the public only through regulations … and only after appropriate process…." (I.e., notice and comment rulemaking). (Emphasis added). Moreover, as set forth in the EO on "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," "Guidance documents may not be used to impose new standards of conduct on persons … except as expressly authorized by law…." That EO further states:

> "When an agency takes an administrative enforcement action … or otherwise makes a determination that has legal consequence for a person, it must establish a violation of law by applying statutes and regulations. The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes and regulations. When an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more … than articulate the agency's understanding of how a statute or regulation applies to particular circumstances. An agency may cite a guidance document to convey that understanding in an administrative enforcement action … only if it has notified the public of such document in advance through publication … in the Federal Register…."

The effect of these EOs and related Justice Department memoranda, is to confirm that the 2010 HUD "Interpretive Rule," is substantively incorrect, invalid and a misstatement of applicable law.

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[5] See, United States Attorney General Memorandum entitled "Prohibition on Improper Guidance Documents."

[6] See, United States Justice Department Memorandum entitled "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases."

[7] See, Attachment 2 hereto, "Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents," and Attachment 3 hereto, "Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication."

[8] The January 25, 2018 memorandum defines "ACE," or "Affirmative Civil Enforcement" cases, as follows: "'Affirmative civil enforcement' refers to the Department's filing of civil lawsuits on behalf of the United States to … impose penalties for violations of federal health, safety, civil rights or environmental laws." Insofar as the federal manufactured housing law is manifestly a federal "safety" law, an action to enforce the federal manufactured housing standards or regulations would clearly be an "ACE" action within the meaning of the January 25, 2018 memorandum.

The APA, by its express terms, already requires notice and comment rulemaking for "rules." Sections 604(a) and 604(b) of the 2000 reform law, expand and clarify this mandate in the specific context of federal manufactured housing regulation, by requiring notice and comment rulemaking, as well as prior MHCC consensus review, for proposed manufactured housing standards, PER regulations and Interpretative Bulletins. Section 604(b)(6), then, expands this mandate even further, by separately requiring both rulemaking and prior MHCC consensus review for all changes to HUD "policies, practices, or procedures" – as well as new "policies practices or procedures" – "relating to construction and safety standards, regulations, inspections, monitoring, or other enforcement activities that constitutes a statement of general or particular applicability to implement, interpret, or prescribe law or policy," regardless of how any such change is denominated, characterized, depicted, or presented by HUD.

To construe section 604(b)(6) to apply only to "rules" that would be subject to notice and comment rulemaking in any event under section 553 of the APA – as the 2010 "Interpretive Rule" purports to do -- is to render section 604(b)(6) and that mandate devoid of any meaning and effectively strip it out of the 2000 reform law despite Congress' clear intent to require both consensus procedures and rulemaking for changes that alter the burdens imposed by HUD on regulated parties pursuant to federal manufactured housing law, whether characterized as "rules" or not. Any such construction would flagrantly exceed HUD's authority, would unlawfully supplant the lawmaking authority of Congress, would violate the letter and purpose of the 2000 reform law, and would constitute a blatant and unacceptable abuse of HUD's authority. Moreover, as is demonstrated by the October 9, 2019 EOs and the November 16, 2017 and January 25, 2018 memoranda, the Justice Department would quite properly refuse to enforce any such "guidance" documents, issued without rulemaking and prior MHCC consensus review, as binding mandates on regulated parties in any type of enforcement proceeding sought by HUD, in any event.

Accordingly, the February 5, 2010 Interpretive Rule should be formally withdrawn by HUD pursuant to EOs 13771 and 13777.

DRC-219: The issue addressed by DRC-219 is directly related to DRC-2 and DRC-281. MHARR-proposed DRC-219 calls on HUD to "withdraw … Field Guidance memoranda" issued by the Department "without MHCC consideration or other due process." The General Subcommittee voted unanimously to refer this proposal to HUD.[9] Effectively, this proposal calls for the repeal or withdrawal of all "Field Guidance" memoranda and other HUD interpretation or guidance memoranda, or letters, however denominated, that impose new or additional requirements or mandates on parties subject to regulation by the HUD manufactured housing program, which were issued without prior MHCC review and prior notice and comment pursuant to the APA and section 604(a)(4)(B) or 604(b)(4)(A) of the Manufactured Housing Improvement Act of 2000. As the October 9, 2019 Executive Orders and Justice Department memoranda cited above make clear, binding mandates on federally-regulated parties may not be imposed without publication and prior notice and comment rulemaking under the Administrative Procedure Act. Further, in the specific case of the HUD manufactured housing program, new or amended binding mandates cannot be imposed without prior MHCC review and consideration, in addition to prior notice and comment rulemaking. Those EOs and memoranda similarly assert that affirmative civil enforcement actions would not be brought and pursued by the Justice Department based on any such unpublished

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[9] See, General Subcommittee Draft Minutes (July 24, 2019/July 30, 2019) at p. B-1.

"guidance" document(s). Consequently, insofar as HUD has issued multiple "guidance" documents without either prior MHCC review or prior notice and comment rulemaking – and to the extent that the above-described February 5, 2010 "Interpretive Rule" issued by HUD is invalid and in direct conflict with the October 9, 2019 EOs and the 2017 and 2018 Justice Department memoranda – such guidance documents violate both the APA and 2000 reform law, and are unenforceable. As a result, those "guidance" documents must be formally withdrawn pursuant to EOs 13771 and 13777 as invalid and unlawful agency actions.[10]

DRC-77: MHARR-proposed DRC-77 is, effectively, a subset of DRC-219, above and, like DRC-219, is directly related to DRC-2 and DRC-281. It states that "HUD should withdraw all operating procedures memoranda and materials relating to expanded in-plant regulation." The General Subcommittee voted unanimously to refer this proposal to HUD.[11]

HUD's program of expanded in-plant manufactured housing regulation, initiated in 2008 with no evidence of systemic deficiencies in the then-existing regulatory model (and apparently designed to sustain and generate substantial additional revenues for the program's entrenched monitoring contractor in the face of a significant decline in manufactured housing production), and implemented in all phases by HUD in 2014, is a premier illustration of the Department's regulatory over-reach and abuse. Originally characterized as "cooperative" and "voluntary" by HUD, this program which fundamentally changed the focus, basis and emphasis of HUD in-plant production regulation, was subsequently re-characterized as "not voluntary" by the Department, with no public process – in violation of both section 604(b)(6) of the 2000 reform law and the Administrative Procedure Act -- in 2010.[12] Since August 2014, the program has been enforced on a mandatory basis through arbitrary, subjective and costly in-plant "audits" conducted by HUD's "monitoring" contractor, based on criteria exceeding existing HUD Code standards and regulations, contained in a collection of non-regulatory and extra-regulatory materials including, but not limited to, "enhanced" inspection checklists, "Standard Operating Procedures," program "Field Guidance" memoranda, an "Investigation and Reporting of Quality System Issues (QSI)" "guidebook," and other related materials. Neither these criteria and materials, or the HUD program of expanded in-plant regulation itself, however, was ever subjected to the due process, stakeholder participation, accountability and transparency requirements of the 2000 reform law.

Given the fact that HUD's program of expanded in-plant regulation changes program policies, practices and procedures with respect to the focus, extent and basis of in-plant regulation,

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[10] The relevant Field Guidance memoranda which must be withdrawn include, but are not limited to, HUD's: (1) Frost Free Field Guidance Memorandum; (2) Field Guidance and related Operating Procedures regarding expanded in-plant regulation; (3) June 12, 2014 and November 10, 2014 memoranda concerning "attached garages" and "add-ons;" (4) Filed Guidance on attic insulation (March 1, 2014); Field Guidance on Air Ducts (May 1, 2014); (5) RV Exemption Memoranda (October 1, 2014 and January 20, 2015); (6) Memorandum on single-family use (October 3, 2014); (7) Memorandum on electrical connection workmanship (December 5, 2014); (8) Memorandum on mixing valves (March 10, 2015; (9) Memorandum on deviation reports (August 31, 2015); (10) Memorandum on chassis bonding connections (August 31, 2015); (11) Memorandum on off-line fabrication (February 25, 2017); (12) Memorandum regarding on-site completion (August 17, 2016); and (13) Memorandum on professional engineer/registered architect seals for Wind Zone II and III structural designs (December 7, 2016).

[11] See, General Subcommittee Draft Minutes (July 24, 2019/July 30, 2019) at p. B-3.

[12] See, HUD (William W. Matchneer, III, Associate Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing) Memorandum dated March 3, 2010.

inspections and monitoring (and given the excessive and unnecessary costs that it imposes and are ultimately passed to consumers), that program – and all its constituent elements – regardless of how characterized or denominated by HUD, should have been brought to the MHCC for consensus review and recommendations pursuant to section 604(b)(6) of the 2000 reform law. No such review, however, was ever undertaken, due to HUD's baseless 2010 Interpretive Rule, which unlawfully negated that section of the law. To the extent, therefore, that the 2010 Interpretive Rule directly conflicts with the October 9, 2019 EOs and the 2017 and 2018 Justice Department memoranda, a proper and legitimate construction of section 604(b)(6) would result in all such elements of HUD's program of expanded in-plant regulation being deemed "void" in accordance with the express terms of that section. Moreover, insofar as the above-described EOs and Justice Department memoranda provide that new or modified regulatory mandates may not be imposed via unpublished "guidance" or similar documents, the various constituent memoranda, guidance and Standard Operating Procedures underlying HUD's program of expanded in-plant regulation are similarly unenforceable and must be withdrawn.

DRC-138: MHARR-proposed DRC-138 calls on HUD to "withdraw all pre-2000 'guidance' regarding the scope of federal preemption." The Regulatory Enforcement Subcommittee voted to take "no further action" on this proposal, while voting to refer DRC-130 to HUD. DRC-130 states that "despite having legal authority, HUD has been lax in intervening when local jurisdictions have sought to impose different/conflicting standards or exclude HUD-compliant homes. Because local regulations, e.g., zoning ordinances, that exclude [manufactured homes] often have a disparate impact on protected classes, enforcing preemption would further HUD's mandate under the Fair Housing Act." While MHARR supports MHCC and HUD adoption of DRC-130, that proposal conflates two separate issues, i.e., protection of protected classes under the Fair Housing Act and the full and proper implementation of the enhanced federal preemption provision of the Manufactured Housing Improvement Act of 2000. Insofar as MHARR-proposed DRC-138 would unambiguously eliminate an existing roadblock to the full and proper implementation of that enhanced preemption, in a way that would help eliminate discriminatory local prohibitions against federally-regulated manufactured housing, the full MHCC should approve and refer DRC-138 for action by HUD.

DRC-138 relates to "guidance" documents published by HUD without notice and comment on January 23, 1997 and May 5, 1997 which construed and interpreted the federal preemption provision of the federal manufactured housing law (42 U.S.C. 5403(d)) in existence at that time in extremely narrow terms, effectively sanctioning the exclusion of HUD Code manufactured homes from extensive areas of the country based on discriminatory criteria masked as "zoning" measures. This excessively narrow interpretation of federal preemption should have changed completely – and immediately -- in the wake of the 2000 reform law which significantly expanded the scope and reach of federal preemption with respect to manufactured housing, stating, in relevant part: "Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate state or local requirements or standards do not affect the uniformity and comprehensiveness of the [federal] standards promulgated under this section nor the federal superintendence of the manufactured housing industry…." (Emphasis added).

With this amendment, Congress legislatively overruled – in express and unequivocal terms – HUD's pre-existing unduly narrow interpretation and application of federal preemption. Second,

With this amendment, Congress legislatively overruled – in express and unequivocal terms – HUD's pre-existing unduly narrow interpretation and application of federal preemption. Second, it explicitly expanded the scope of that preemption. Thus, while HUD had previously ruled that the federal standards could only preempt state or local construction or safety standards, the 2000 reform law expressly expanded the reach of federal preemption to also include state or local "requirements" that interfere with federal "superintendence" of the industry and, by natural extension, to the accomplishment of the federal law's purposes, including expanding the availability and affordability of manufactured housing.

Despite this significant enhancement of federal preemption, HUD has never withdrawn its legislatively-overruled preemption "guidance" issued prior to the enactment of the 2000 reform law. Instead, for nearly two decades, HUD has maintained the unsupportable fiction that the 2000 law did not make any *real* change to federal preemption and that, as a result, it did not need to change its administrative approach to preemption. This position not only conflicts with the plain meaning and legislative history of the changes made in the 2000 reform law but has resulted in significant harm to both the HUD Code industry and the lower and moderate-income American families who rely on manufactured housing as the nation's premier source of affordable, non-subsidized home-ownership. By continuing an unduly narrow approach to federal preemption, HUD has allowed localities to use alleged "standards" and various other types of mandates, including supposed "zoning" ordinances and requirements, to effectively exclude and discriminate-against the industry, its products and, most importantly, the Americans who seek to purchase and own a manufactured home of their own.

The MHCC, accordingly, should recommend that HUD: (1) withdraw all preemption "guidance" documents and other directives issued prior to the 2000 reform law; (2) fully implement the enhanced federal preemption mandated by the 2000 reform law, including the preemption of "zoning" and placement restrictions which discriminatorily exclude HUD code manufactured housing; and (3) engage the MHCC to develop new, replacement guidance on the scope and applicability of the enhanced federal preemption mandated by the 2000 reform law. The adoption of DRC-138 would move this necessary process forward.

DRC-26; DRC-139: MHARR-proposed DRC-26 and DRC-139 are based on MHARR's call – in its February 20, 2018 regulatory reform comments – for Subpart I of the HUD Procedural and Enforcement Regulations (PER) to be "amended to conform to applicable law."[13] The Regulatory Enforcement Subcommittee voted to take no further action on these proposals subject to action to develop proposed regulatory language pursuant to Log 194. MHARR concurs with the Subcommittee's proposed Subpart I modifications pursuant Log 194 to conform those regulations with section 615 of the federal manufactured housing law.

DRC-17; DRC-89: MHARR-proposed DRC-17 and DRC-89 both relate to MHARR's call for the repeal and replacement of HUD's recently adopted on-site completion rule. The Regulatory Enforcement Subcommittee voted to take no further action on these specific proposals, while moving forward based on DRC-4, addressing the same issue. MHARR supports the vote of the

[13] See, MHARR February 20, 2018 Comments on Regulatory Review of Manufactured Housing Rules (Docket No. FR-6075-N-01) at pp. 12-15.

DRC-57: MHARR-proposed DRC-57 calls for the withdrawal of a pending proposal to include a "voluntary" fire sprinkler standard in the HUD Code. The General Subcommittee voted to reject DRC-57. MHARR asks the full MHCC to disapprove the recommendation of the General Subcommittee and to forward this DRC to HUD for further action.

First, procedurally, MHARR's proposed DRC-57, regarding a so-called "voluntary" fire sprinkler standard, should not have been assigned to the General Subcommittee for review in the first place. The Bylaws of the MHCC provide, at Section 5(a)(iv), that "the Secretary shall clearly state the … duties" of each MHCC subcommittee. The 2019 MHCC subcommittee roster published by HUD, states that the Structure and Design Subcommittee, not the General Subcommittee, has jurisdiction over proposals relating to Subpart C of the HUD standards, addressing "Fire Safety." Insofar as the pending "voluntary" fire sprinkler standard clearly relates to "fire safety," DRC-57 should have been considered by the Structure and Design Subcommittee and not the General Subcommittee. Both HUD's assignment of DRC-57 to the General Subcommittee and the General Subcommittee's consideration of that proposal, accordingly, violate the MHCC's Bylaws and must be withdrawn for proper consideration by the Structure and Design Subcommittee.

Second, on substance, the MHCC, in October 2011, voted to recommend a proposed "voluntary" standard for fire sprinklers in manufactured homes,[14] based on proposals submitted by both HUD and the Manufactured Housing Institute (MHI) and advanced particularly by larger West Coast Manufacturers faced with local sprinkler mandates that HUD has failed to preempt. Such a "voluntary" standard, however, is precluded by the express language of the 1974 Act, as amended, and is unnecessary in any event. The "voluntary" fire sprinkler standard pending at HUD, by its terms, would allow HUD Code manufacturers to select between the National Fire Protection Association's (NFPA) "13D Standard for the Installation of Sprinkler Systems" in manufactured homes, or certain prescriptive elements set forth in the proposed standard, at the election of the manufacturer. The 1974 Act, as amended, however, does not provide for – or authorize – the adoption of "voluntary," conditional, or provisional standards for manufactured homes, nor is any such standard – whether conditional or mandatory – authorized or warranted based on the 1974 Act, as amended.[15]

Fire resistance or prevention is a "safety" issue. The 1974 Act, as amended, defines "manufactured home safety" as the performance of a manufactured home in such a manner that the public is protected against any unreasonable risk of … accidents … or unreasonable risk of death or injury to the user" of the home. (Emphasis added). Putting aside the antiquated (vehicle-derived) reference to manufactured home "accidents," the essential prerequisite to the adoption of any federal manufactured home safety standard, accordingly, is the existence of an "unreasonable risk" of injury or death to the resident. The existence of such an unreasonable risk, moreover, must be determined by HUD, as the agency charged with developing, maintaining and enforcing the federal manufactured housing standards.

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[14] I.e., a federal sprinkler standard that would be triggered if "a manufacturer elects to install a fire sprinkler system or a state or local authority … requires that a fire sprinkler system be installed for all detached single-family dwellings and manufactured homes." (Emphasis added).

[15] The adoption of a "voluntary standard" – which is not authorized by either the original 1974 Act or the 2000 reform law, must be distinguished from the fact that the HUD Code is a minimum standard, under which manufacturers are free to offer options and features which exceed the minimum performance requirements of the Part 3280 standards.

Under this definition, there either is an "unreasonable risk" of injury or death, as determined by HUD, or there is not. If there is an "unreasonable risk," HUD can adopt a federal standard to remedy or alleviate that risk. If, however, there is no "unreasonable risk" to be remedied or alleviated, HUD is without authority and cannot adopt a standard of any kind regarding that matter.

In the case of fire sprinklers, HUD has never determined, or even claimed, that the absence of fire sprinklers in manufactured homes creates an "unreasonable risk" of injury or death to residents of homes produced in accordance with the existing HUD Code fire safety standards. To the contrary, the existing HUD fire safety standards – which, again, do not require or address the use of sprinklers – state that, if followed, they "will assure reasonable fire safety to the occupants" of HUD Code manufactured homes. (Emphasis added). This assertion, moreover, is fully supported by data and analyses compiled and published by NFPA in 2011 and 2013, which demonstrate that the rate of both the occurrence of fires and fire injuries in HUD Code manufactured homes[16] is lower than that of site-built and other types of homes,[17] and that the rate of fire deaths in manufactured homes is "comparable" to the rate of fire deaths in other types of homes.[18] Given the absence of any supporting data showing the existence of an "unreasonable risk" of injury or death from fire in a manufactured home constructed in accordance with the existing HUD Code "fire safety" standards, there is no basis for such a finding by HUD and, therefore, no factual predicate – as required by applicable law – for the adoption of any type of federal fire sprinkler standard, either voluntary or mandatory. Consequently, there is no valid or legitimate statutory basis for the consideration of such a rule, making it "unnecessary" within the meaning of EO 13777, Section 3(d)(ii).

Moreover, documents filed with the MHCC in connection with its consideration of the proposed standard indicate that the additional cost of a compliant fire sprinkler system for a double-section manufactured home would range from $3,000 to $3,500, with additional costs up to $3,000 for water connections and on-site inspections. Based on research by the National Association of Home Builders (NAHB) showing that for each additional $1,000 that is added to the price of manufactured housing in regulatory compliance costs, some 347,901 households are excluded from the single-section manufactured housing market and 315,385 households are excluded from the multi-section manufactured housing market, it is evident that such a standard – even if allegedly "voluntary" -- would needlessly "eliminate jobs" and "inhibit job creation" within the meaning of EO 13771, section 3(d)(i), and would "impose costs that exceed benefits."

The existing HUD "fire safety" standards, by contrast, have been effective, as demonstrated by the NFPA data, and have achieved the statutory objective of assuring reasonable safety for manufactured housing residents without imposing undue cost burdens that would exclude hundreds-of-thousands of lower and moderate-income Americans (and potentially more) from all of the benefits of home ownership. Moreover, the existence of an express federal sprinkler standard (whether "voluntary" or mandatory) – as MHARR has consistently and persistently maintained -- is not needed in order to federally preempt state or local fire sprinkler standards for manufactured

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[16] I.e., manufactured homes produced since the advent of federal regulation in 1976.

[17] See, Manufactured Home Fires, National Fire Protection Association, July 2011 at p. 10 ("As in previous analyses, manufactured homes show a lower rate of fires per 1,000 occupied housing units.... Manufactured homes [also] have a lower rate of civilian fire injuries per 100,000 occupied housing units than other one or two-family homes....")

[18] See, Manufactured Home Fires, National Fire Protection Association, July 2011 (Errata Sheet)

homes (as proponents of the proposed "voluntary" standard have asserted). While HUD, in the past, has claimed that an express federal standard under Part 3280 addressing the same exact aspect of manufactured home performance as a parallel and differing state or local standard is necessary in order to preempt state or local standards pursuant to section 604(d) of the 1974 Act, as amended by the 2000 reform law, the Department's most recent preemption determination has implicitly rejected that position and has, instead, begun to implement the *enhanced* federal preemption mandated by Congress in the 2000 reform law.

Thus, in 2014, HUD's Office of General Counsel (OGC) preempted an effort by the State of Minnesota to require an onsite "Blower Door Test" -- pursuant to the International Energy Conservation Code (IECC) -- for all new residential construction, including manufactured homes. In a July 10, 2014 decision, issued by email to Minnesota state authorities, OGC recites both the preemption provision as amended by the Manufactured Housing Improvement Act of 2000 -- with its mandate that preemption be "broadly and liberally" construed -- and the preemption provision of the HUD PER Regulations at 24 C.F.R. 3282.11. It then goes on to state: "The Blower Door Test is essentially <u>a standard requiring remedial actions above and beyond what is required by the federal standards</u>.... Thus, the Act and ... 3282.11(b) and (c) preempt Minnesota's enforcement of the IECC standard." (Emphasis added).

This decision is directly relevant to the preemption of state and/or local fire sprinkler requirements because of the "broad and liberal" nature of its preemption analysis, as mandated by section 604(d) of the 2000 reform law. Unlike past HUD preemption decisions which, as noted above, had focused almost exclusively on whether a state or local standard addressed the "same aspect" of manufactured home "performance" as a federal standard, the blower door decision does not even attempt to identify a federal standard addressing the "same aspect of performance" as the proposed state regulation. Instead, it simply finds -- as expected by Congress when it enacted the enhanced preemption of the 2000 reform law – that the state standard requires action "above and beyond what is required" by the "federal standards," collectively and viewed as a whole. In doing so, it ***rejected*** the state's argument that "when [the] federal standards are silent or do not address a specific code or standard ... the state is not superseding the Federal Standard and may enforce state standards."

The exact same preemption analysis applies – and should be applied by HUD -- to the federal manufactured home "fire safety" standards in relation to state and/or local sprinkler mandates. Insofar as a state or local fire sprinkler mandate for manufactured homes would require action "above and beyond what is required" by the federal manufactured housing fire safety standards – which, as shown by the NFPA data, assure reasonable fire safety without the use of costly sprinklers – such standards are and should be preempted by the federal fire safety standards, regardless of the fact that the federal standards do not, in and of themselves, require the use of fire sprinklers. Accordingly – insofar as fire sprinklers are not needed in order to assure the reasonable fire safety of manufactured housing residents, and a federal fire sprinkler standard (whether voluntary or otherwise) is not needed in order to federally preempt state and/or local fire sprinkler mandates, the "voluntary" fire sprinkler standard pending at HUD, should be expressly, affirmatively and definitively rejected by HUD pursuant to its EO 13771/13777 review of the Part 3280 manufactured housing standards.

III. CONCLUSION

Based on the foregoing and all of its previous comments on the matters addressed by its regulatory reform proposals, MHARR asks that the full MHCC consider, approve and recommend to the Secretary for adoption each of its DRC proposals including, but not limited to, those specifically detailed above.

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Brian Montgomery

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

ATTACHMENT 1

& Co., Lilly Corporate Center, Indianapolis, IN 46285, filed NADA 141–301 for use of TOPMAX (ractopamine hydrochloride) and COBAN (monensin, USP) single-ingredient Type A medicated articles to formulate two-way combination Type C medicated feeds for finishing hen and tom turkeys. The NADA is approved as of December 11, 2009, and the regulations in 21 CFR 558.500 are amended to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(c)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33 that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 2. In § 558.500, add paragraphs (e)(3)(iii) and (e)(3)(iv) to read as follows:

§ 558.500 Ractopamine.

* * * * *

(e) * * *

(3) * * *

Ractopamine in grams/ton	Combination in grams/ton	Indications for use	Limitations	Sponsor
*	*	* *	* *	*
(iii) 4.6 to 11.8 (5 to 13 ppm)	Monensin 54 to 90	Finishing hen turkeys: As in paragraph (e)(3)(i) of this section; and for the prevention of coccidiosis in growing turkeys caused by *Eimeria adenoeides*, *E. meleagrimitis* and *E. gallopavonis*.	Feed continuously as sole ration during the last 7 to 14 days prior to slaughter. See § 558.355(d).	000986
(iv) 4.6 to 11.8 (5 to 13 ppm)	Monensin 54 to 90	Finishing tom turkeys: As in paragraph (e)(3)(ii) of this section; and for the prevention of coccidiosis in growing turkeys caused by *Eimeria adenoeides*, *E. meleagrimitis* and *E. gallopavonis*.	Feed continuously as sole ration during the last 14 days prior to slaughter. Feeding ractopamine to tom turkeys during periods of excessive heat can result in increased mortality. See § 558.355(d).	000986

Dated: February 1, 2010.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2010–2427 Filed 2–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 3280 and 3282

[Docket No. FR–5343–IN–01]

RIN 2502–AI77

Federal Manufactured Home Construction and Safety Standards and Other Orders: HUD Statements That Are Subject to Consensus Committee Processes

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Interpretive rule.

SUMMARY: The National Manufactured Housing Construction and Safety Standards Act of 1974 provides that certain classes of statements by HUD relating to manufactured housing requirements are subject to proposal, review, and comment processes involving a consensus committee. The consensus committee includes representatives of manufactured housing producers and users, as well as general interest and public officials. This rule interprets the statutory requirement to clarify the types of statements that are subject to the proposal, review, and comment processes.

DATES: *Effective Date:* February 5, 2010.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Associate Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing, Office of Manufactured Housing Programs, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 9164, Washington, DC 20410; telephone number 202–708–6401 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401–5426) ("the Act"), as amended by the Manufactured Housing Improvement Act of 2000 (Title VI, Pub. L. 106–659), provides for the establishment and revision of Federal construction and safety standards for manufactured housing, as well as for procedural and enforcement regulations and interpretive bulletins related to implementation of these standards.

Section 604(a) of the Act provides, among other things, the process for the development, proposal, and issuance of revisions of Federal construction and safety standards, which govern the construction, design, and performance of a manufactured home. Section 604(a) establishes a consensus committee, which is comprised of representatives of manufactured housing producers and

users, as well as general interest and public officials. Section 604(a)(3)(A) provides that the consensus committee shall:

(i) Provide periodic recommendations to the Secretary to adopt, revise, and interpret the Federal manufactured housing construction and safety standards in accordance with this subsection;

(ii) Provide periodic recommendations to the Secretary to adopt, revise, and interpret the procedural and enforcement regulations, including regulations specifying the permissible scope and conduct of monitoring in accordance with subsection (b) of this section;

(iii) Be organized and carry out its business in a manner that guarantees a fair opportunity for the expression and consideration of various positions and for public participation; and

(iv) Be deemed to be an advisory committee not composed of Federal employees. HUD has by regulation expanded the role of the consensus committee beyond that required under the Act. Although the Act provided that the consensus committee was to develop the original proposed model installation standards for manufactured housing, HUD has provided in 24 CFR 3285.1(c) that whenever HUD proposes to revise the model installation standards, it will also seek input and comment from the consensus committee. Similarly, HUD has provided in 24 CFR 3288.305 that it will seek input from the consensus committee whenever it proposes to revise the manufactured housing dispute resolution regulations.

In accordance with section 604(a) of the Act, the consensus committee may submit to HUD proposals to revise the Federal construction and safety standards, and HUD may either publish recommended standards for notice and public comment, or publish a standard along with its reasons for rejecting the standard. Upon consideration of any public comments, the consensus committee must provide HUD with any proposed revised standards, which HUD must in turn publish with either a description of the circumstances under which the proposed revised standard could become effective or, alternatively, HUD's reasons for rejecting the proposed revised standard. HUD must then adopt, modify, or reject any proposed standards through procedures and within the time frames specified in subsection 604(a).

Section 604(b) of the Act provides, among other things, the process for issuance of "other orders," which consist of procedural and enforcement regulations and interpretive bulletins. Interpretive bulletins clarify the meaning of Federal manufactured home construction and safety standards, procedural regulations, and enforcement regulations. Before HUD issues a procedural regulation, enforcement regulation, or interpretive bulletin, it must submit its proposed regulation or interpretive bulletin to the consensus committee for review and comment. HUD may accept or reject any consensus committee comments, but upon doing so, it must publish for public notice and comment the proposed regulation or interpretive bulletin, along with the consensus committee's comments and HUD's responses to the consensus committee's comments. The consensus committee may also submit its own proposed procedural regulations, enforcement regulations, and interpretive bulletins to HUD. Upon receiving such a proposal from the consensus committee, HUD must either approve the proposal and publish it for public notice and comment, or reject the proposal and publish it along with its reasons for the rejection and any recommended modifications.

Section 604(b)(6) of the Act is entitled "Changes" and reads in its entirety as follows:

> Any statement of policies, practices, or procedures relating to construction and safety standards, regulations, inspections, monitoring, or other enforcement activities that constitutes a statement of general or particular applicability to implement, interpret, or prescribe law or policy by the Secretary is subject to [section 604(a)] or this [section 604(b)]. Any change adopted in violation of [section 604(a)] or this [section 604(b)] is void.

Some questions have arisen within the consensus committee over what statements by HUD fall within the scope of section 604(b)(6). For example, some have asserted that the consensus committee has broad jurisdiction and authority over all aspects of HUD's manufactured housing program, such that HUD's internal budgets, contract decisions, and determinations whether to take enforcement action must be made or approved in advance by the consensus committee. HUD is concerned that such assertions may lead to confusion among members of the public, which is routinely invited to attend consensus committee meetings, with regard to the consensus committee's role. Accordingly, HUD is issuing this interpretive rule to clarify the scope of section 604(b)(6)'s coverage.

II. This Interpretive Rule

This rule interprets the scope of section 604(b)(6) to clarify the types of statements by HUD to which the section applies. HUD notes that in specifying which statements "relating to construction and safety standards, regulations, inspections, monitoring, or other enforcement activities" are subject to section 604(a) or (b), section 604(b)(6) uses language that is nearly identical to that found in the Administrative Procedure Act's (5 U.S.C. 551 *et seq.*) (the APA) definition of a "rule." The APA definition states, in pertinent part:

> "Rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." (5 U.S.C. 551(4))

Over the 63 years since enactment of the APA, courts have developed extensive case law interpreting the APA's definition of a rule. (*See, e.g.*, Jeffery S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4th ed., (2006), pp. 49–126.) HUD will not attempt to summarize this case law in this interpretive rule, but views section 604(b)(6) as demonstrating Congress's intent to incorporate the APA's definition of a rule as developed by the courts, except to the extent that section 604(b)(6) deviates substantively from the APA definition. HUD notes that the only substantive difference between the scope of section 604(b)(6) and the APA's definition of a rule is that section 604(b)(6) excludes from coverage statements describing agency organization. Although section 604(b)(6) does not repeat the APA definition's express provision that the statement be one "of future effect," HUD does not interpret this difference as a substantive one, since virtually any statement that "implements, interprets, or prescribes law or policy" is necessarily a statement of future effect. Finally, the scope of section 604(b)(6) is limited by its own terms to statements relating to manufactured housing "construction and safety standards, regulations, inspections, monitoring, or other enforcement activities" that amount to a "change." Statements relating to other matters, including interpretation of other matters covered by the Act, statements that merely summarize or repeat the substance of prior statements or practices, and statements that merely provide guidance, are beyond the scope of section 604(b)(6).

Accordingly, HUD interprets the scope of section 604(b)(6) to include only statements by HUD that:

(1) Relate to manufactured housing construction and safety standards, regulations, inspections, monitoring, or other enforcement activities;

(2) Meet the definition of a "rule" under the APA and applicable case law, except that statements describing agency organization are not included; and

(3) Constitute a change from prior HUD statements or practice on the same subject matter.

III. Findings and Certifications

Environmental Impact

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

List of Subjects

24 CFR Part 3280

Fire prevention, Housing standards.

24 CFR Part 3282

Administrative practice and procedure, Consumer protection, Intergovernmental relations, Investigations, Manufactured homes, Reporting and recordkeeping requirements.

Dated: January 27, 2010.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2010–2571 Filed 2–4–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–8115]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.;* unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register.**

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

ATTACHMENT 2

EXECUTIVE ORDERS

Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents

LAW & JUSTICE

Issued on: October 9, 2019

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure that Americans are subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them, and that Americans have fair notice of their obligations, it is hereby ordered as follows:

Section 1. Policy. Departments and agencies (agencies) in the executive branch adopt regulations that impose legally binding requirements on the public even though, in our constitutional democracy, only Congress is vested with the legislative power. The Administrative Procedure Act (APA) generally requires agencies, in exercising that solemn responsibility, to engage in notice-and-comment rulemaking to provide public notice of proposed regulations under section 553 of title 5, United States Code, allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the Federal Register.

Agencies may clarify existing obligations through non binding guidance documents, which the APA exempts from notice-and-comment requirements. Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA. Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply. Moreover, the public frequently has insufficient notice of guidance documents, which are not always published in the Federal Register or distributed to all regulated parties.

Americans deserve an open and fair regulatory process that imposes new obligations on the public only when consistent with applicable law and after an agency follows appropriate procedures. Therefore, it is the policy of the executive branch, to the extent consistent with

applicable law, to require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.

Sec. 2. Definitions. For the purposes of this order:

(a) "Agency" has the meaning given in section 3(b) of Executive Order 12866 (Regulatory Planning and Review), as amended.

(b) "Guidance document" means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include the following:

(i) rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;

(ii) rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(iii) rules of agency organization, procedure, or practice;

(iv) decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or

(vi) internal executive branch legal advice or legal opinions addressed to executive branch officials.

(c) "Significant guidance document" means a guidance document that may reasonably be anticipated to:

(i) lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(ii) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(iii) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(iv) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

(d) "Pre-enforcement ruling" means a formal written communication by an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (Title II), as amended, letter rulings, advisory opinions, and no-action letters.

Sec. 3. Ensuring Transparent Use of Guidance Documents. (a) Within 120 days of the date on which the Office of Management and Budget (OMB) issues an implementing memorandum under section 6 of this order, each agency or agency component, as appropriate, shall establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component. The website shall note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.

(b) Within 120 days of the date on which OMB issues an implementing memorandum under section 6 of this order, each agency shall review its guidance documents and, consistent with applicable law, rescind those guidance documents that it determines should no longer be in effect. No agency shall retain in effect any guidance document without including it in the relevant database referred to in subsection (a) of this section, nor shall any agency, in the future, issue a guidance document without including it in the relevant database. No agency may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts. Within 240 days of the date on which OMB issues an implementing memorandum, an agency may reinstate a guidance document rescinded under this subsection without complying with any procedures adopted or imposed pursuant to section 4 of this order, to the extent consistent with applicable law, and shall include the guidance document in the relevant database.

(c) The Director of OMB (Director), or the Director's designee, may waive compliance with subsections (a) and (b) of this section for particular guidance documents or categories of guidance documents, or extend the deadlines set forth in those subsections.

(d) As requested by the Director, within 240 days of the date on which OMB issues an implementing memorandum under section 6 of this order, an agency head shall submit a report to the Director with the reasons for maintaining in effect any guidance documents identified by the Director. The Director shall provide such reports to the President. This subsection shall apply only to guidance documents existing as of the date of this order.

Sec. 4. Promulgation of Procedures for Issuing Guidance Documents. (a) Within 300 days of the date on which OMB issues an implementing memorandum under section 6 of this order, each agency shall, consistent with applicable law, finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. The process set forth in each regulation shall be consistent with this order and shall include:

(i) a requirement that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;

(ii) procedures for the public to petition for withdrawal or modification of a particular guidance document, including a designation of the officials to which petitions should be directed; and

(iii) for a significant guidance document, as determined by the Administrator of OMB's Office of Information and Regulatory Affairs (Administrator), unless the agency and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements, provisions requiring:

(A) a period of public notice and comment of at least 30 days before issuance of a final guidance document, and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest;

(B) approval on a non-delegable basis by the agency head or by an agency component head appointed by the President, before issuance;

(C) review by the Office of Information and Regulatory Affairs (OIRA) under Executive Order 12866, before issuance; and

(D) compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563 (Improving Regulation and Regulatory Review), 13609 (Promoting International Regulatory Cooperation), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13777 (Enforcing the Regulatory Reform Agenda).

(b) The Administrator shall issue memoranda establishing exceptions from this order for categories of guidance documents, and categorical presumptions regarding whether guidance documents are significant, as appropriate, and may require submission of significant guidance documents to OIRA for review before the finalization of agency regulations under subsection (a) of this section. In light of the Memorandum of Agreement of April 11, 2018, this section and section 5 of this order shall not apply to the review

relationship (including significance determinations) between OIRA and any component of the Department of the Treasury, or to compliance by the latter with Executive Orders 12866, 13563, 13609, 13771, and 13777. Section 4(a)(iii) and section 5 of this order shall not apply to pre-enforcement rulings.

Sec. 5. Executive Orders 12866, 13563, and 13609. The requirements and procedures of Executive Orders 12866, 13563, and 13609 shall apply to guidance documents, consistent with section 4 of this order.

Sec. 6. Implementation. The Director shall issue memoranda and, as appropriate, regulations pursuant to sections 3504(d)(1) and 3516 of title 44, United States Code, and other appropriate authority, to provide guidance regarding or otherwise implement this order.

Sec. 7. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Notwithstanding any other provision in this order, nothing in this order shall apply:

(i) to any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than guidance documents involving procurement or the import or export of non-defense articles and services);

(ii) to any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(iii) to any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee;

(iv) to any document or information that is exempt from disclosure under section 552(b) of title 5, United States Code (commonly known as the Freedom of Information Act); or

(v) in any other circumstance or proceeding to which application of this order, or any part of this order, would, in the judgment of the head of the agency, undermine the national security.

DONALD J. TRUMP

THE WHITE HOUSE,
October 9, 2019.

EXECUTIVE ORDERS

Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication

Issued on: October 9, 2019

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions. The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., was enacted to provide that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." Morton v. Ruiz, 415 U.S. 199, 232 (1974). The Freedom of Information Act, America's landmark transparency law, amended the APA to further advance this goal. The Freedom of Information Act, as amended, now generally requires that agencies publish in the Federal Register their substantive rules of general applicability, statements of general policy, and interpretations of law that are generally applicable and both formulated and adopted by the agency (5 U.S.C. 552(a)(1)(D)). The Freedom of Information Act also generally prohibits an agency from adversely affecting a person with a rule or policy that is not so published, except to the extent that the person has actual and timely notice of the terms of the rule or policy (5 U.S.C. 552(a)(1)).

Unfortunately, departments and agencies (agencies) in the executive branch have not always complied with these requirements. In addition, some agency practices with respect to enforcement actions and adjudications undermine the APA's goals of promoting accountability and ensuring fairness.

Agencies shall act transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement or adjudication. No person should be subjected to a civil administrative enforcement action or adjudication absent prior

public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct. Moreover, the Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct. Agencies shall afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose.

Sec. 2. Definitions For the purposes of this order:

(a) "Agency" has the meaning given to "Executive agency" in section 105 of title 5, United States Code, but excludes the Government Accountability Office.

(b) "Collection of information" includes any conduct that would qualify as a "collection of information" as defined in section 3502(3)(A) of title 44, United States Code, or section 1320.3(c) of title 5, Code of Federal Regulations, and also includes any request for information, regardless of the number of persons to whom it is addressed, that is:

(i) addressed to all or a substantial majority of an industry; or

(ii) designed to obtain information from a representative sample of individual persons in an industry.

(c) "Guidance document" means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include the following:

(i) rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;

(ii) rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(iii) rules of agency organization, procedure, or practice;

(iv) decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or

(vi) internal executive branch legal advice or legal opinions addressed to executive branch officials.

(d) "Legal consequence" means the result of an action that directly or indirectly affects substantive legal rights or obligations. The meaning of this term should be informed by the Supreme Court's discussion in U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807, 1813–16 (2016), and includes, for example, agency orders specifying which commodities are subject to or exempt from regulation under a statute, Frozen Food Express v. United States, 351 U.S. 40, 44–45 (1956), as well as agency letters or orders establishing greater liability for regulated parties in a subsequent enforcement action, Rhea Lana, Inc. v. Dep't of Labor, 824 F.3d 1023, 1030 (D.C. Cir. 2016). In particular, "legal consequence" includes subjecting a regulated party to potential liability.

(e) "Unfair surprise" means a lack of reasonable certainty or fair warning of what a legal standard administered by an agency requires. The meaning of this term should be informed by the examples of lack of fair notice discussed by the Supreme Court in Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 & n.15 (2012).

(f) "Pre-enforcement ruling" means a formal written communication from an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (Title II), as amended (SBREFA), letter rulings, advisory opinions, and no action letters.

(g) "Regulation" means a legislative rule promulgated pursuant to section 553 of title 5, United States Code, or similar statutory provisions.

<u>Sec</u>. <u>3</u>. <u>Proper Reliance on Guidance Documents</u>. Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it must establish a violation of law by applying statutes or regulations. The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations. When an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the agency's understanding of how a statute or regulation applies to particular circumstances. An agency may cite a guidance document to convey that understanding in an administrative enforcement action or adjudication only if it has notified the public of such document in advance through publication, either in full or by citation if publicly available, in the Federal Register (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect).

Sec. 4. Fairness and Notice in Administrative Enforcement Actions and Adjudications. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law.

Sec. 5. Fairness and Notice in Jurisdictional Determinations. Any decision in an agency adjudication, administrative order, or agency document on which an agency relies to assert a new or expanded claim of jurisdiction — such as a claim to regulate a new subject matter or an explanation of a new basis for liability — must be published, either in full or by citation if publicly available, in the Federal Register (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) before the conduct over which jurisdiction is sought occurs. If an agency intends to rely on a document arising out of litigation (other than a published opinion of an adjudicator), such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future administrative enforcement actions or adjudications involving persons who were not parties to the litigation, it must publish that document, either in full or by citation if publicly available, in the Federal Register (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) and provide an explanation of its jurisdictional implications. An agency may not seek judicial deference to its interpretation of a document arising out of litigation (other than a published opinion of an adjudicator) in order to establish a new or expanded claim or jurisdiction unless it has published the document or a notice of availability in the Federal Register (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect).

Sec. 6. Opportunity to Contest Agency Determination. (a) Except as provided in subsections (b) and (c) of this section, before an agency takes any action with respect to a particular person that has legal consequence for that person, including by issuing to such a person a no-action letter, notice of noncompliance, or other similar notice, the agency must afford that person an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations. The agency must respond in writing and articulate the basis for its action.

(b) Subsection (a) of this section shall not apply to settlement negotiations between agencies and regulated parties, to notices of a prospective legal action, or to litigation before courts.

(c) An agency may proceed without regard to subsection (a) of this section where necessary because of a serious threat to health, safety, or other emergency or where a statute specifically authorizes proceeding without a prior opportunity to be heard. Where an agency proceeds under this subsection, it nevertheless must afford any person an opportunity to be

heard, in person or in writing, regarding the agency's legal determinations and respond in writing as soon as practicable.

Sec. 7. Ensuring Reasonable Administrative Inspections. Within 120 days of the date of this order, each agency that conducts civil administrative inspections shall publish a rule of agency procedure governing such inspections, if such a rule does not already exist. Once published, an agency must conduct inspections of regulated parties in compliance with the rule.

Sec. 8. Appropriate Procedures for Information Collections. (a) Any agency seeking to collect information from a person about the compliance of that person or of any other person with legal requirements must ensure that such collections of information comply with the provisions of the Paperwork Reduction Act, section 3512 of title 44, United States Code, and section 1320.6(a) of title 5, Code of Federal Regulations, applicable to collections of information (other than those excepted under section 3518 of title 44, United States Code).

(b) To advance the purposes of subsection (a) of this section, any collection of information during the conduct of an investigation (other than those investigations excepted under section 3518 of title 44, United States Code, and section 1320.4 of title 5, Code of Federal Regulations, or civil investigative demands under 18 U.S.C. 1968) must either:

(i) display a valid control number assigned by the Director of the Office of Management and Budget; or

(ii) inform the recipient through prominently displayed plain language that no response is legally required.

Sec. 9. Cooperative Information Sharing and Enforcement. (a) Within 270 days of the date of this order, each agency, as appropriate, shall, to the extent practicable and permitted by law, propose procedures:

(i) to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties;

(ii) to encourage voluntary information sharing by regulated parties; and

(iii) to provide pre-enforcement rulings to regulated parties.

(b) Any agency that believes additional procedures are not practicable — because, for example, the agency believes it already has adequate procedures in place or because it believes it lacks the resources to institute additional procedures — shall, within 270 days of the date of this order, submit a report to the President describing, as appropriate, its existing procedures, its need for more resources, or any other basis for its conclusion.

Sec. 10. SBREFA Compliance. Within 180 days of the date of this order, each agency shall submit a report to the President demonstrating that its civil administrative enforcement activities, investigations, and other actions comply with SBREFA, including section 223 of that Act. A copy of this report, subject to redactions for any applicable privileges, shall be posted on the agency's website.

Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Notwithstanding any other provision in this order, nothing in this order shall apply:

(i) to any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than procurement actions and actions involving the import or export of non-defense articles and services);

(ii) to any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(iii) to any action related to detention, seizure, or destruction of counterfeit goods, pirated goods, or other goods that infringe intellectual property rights;

(iv) to any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee; or

(v) in any other circumstance or proceeding to which application of this order, or any part of this order, would, in the judgment of the head of the agency, undermine the national security.